

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,)	
)	
Respondent,)	
)	
v.)	Crim. No. 1:14-CR-167
)	Civil Action No. 1:15-CV-892
MICHAEL LAWRENCE EISNER,)	
)	
Petitioner.)	

MOTION TO COMPEL

COMES NOW the United States of America, by and through its counsel, Dana J. Boente, United States Attorney, and Andres E. Vasquez, Special Assistant United States Attorney and moves for an Order compelling trial defense counsel to disclose relevant confidential information in response to defendant MICHAEL LAWRENCE EISNER's claim of ineffective assistance of counsel.

1. In his Motion filed pursuant to 28 U.S.C. § 2255, EISNER makes the following claim, *inter alia*:

Eisner's counsel failed to provide effective assistance of counsel by failing to investigate and present mitigating evidence at setencing . . .

(Defendant's Motion at p. 5).

2. By making such a claim, EISNER has waived his attorney-client privilege. *Johnson v. Alabama*, 256 F.3d 1156, 1178 (11th Cir. 2001) ("By alleging that his attorneys provided ineffective assistance of counsel in their choice of a defense strategy, Johnson put at issue-and thereby waived-any privilege

that might apply to the contents of his conversations with those attorneys to the extent those conversations bore on his attorneys' strategic choices."); *Laughner v. United States*, 373 F.2d 326, 327 (5th Cir. 1967) ("The rule that a client waives his privilege by attacking the attorney's performance of his duties seems to have been adopted unanimously by those courts which have dealt with the question. . . ."); *Tasby v. United States*, 504 F.2d 332, 336 (8th Cir. 1974) ("It has long been the law that a client may waive protection of the privilege, either expressly or impliedly. *Blackburn v. Crawfords*, 70 U.S. (3 Wall.) 175, 194, 18 L.Ed. 186 (1865)."); *Harris v. United States*, Slip Copy, 2009 WL 5098970 (E.D.Va., 2009) (citing *Tasby*).

3. The American Bar Association Standing Committee on Ethics and Professional Responsibility has issued "ABA Formal Opinion 10-456, which suggests that defense counsel usually may not disclose a former client's confidential information voluntarily to the government absent the client's consent or in response to a court order.

4. Government counsel has requested that trial defense counsel, Kevin R. Brehm, submit a declaration pursuant to 28 U.S.C. § 1746 addressing EISNER's claims of ineffectiveness. On September 30, 2016, trial defense counsel informed the government that they were reluctant to do so absent an Order from this Court.

5. Trial defense counsel have informed government counsel that they do not oppose the issuance of such an Order.

6. Accordingly, the government respectfully requests that this Court enter the attached proposed Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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